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No. 150

In the Supreme Court of the United States

OCTOBER TERM, 1955

W. A. SHIELDS, PETITIONER

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE

ROBERT W. GINNANE,
General Counsel,

C. H. JOHNS,
Assistant General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

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STATEMENT

In granting the writ of certiorari, this Court expressed its readiness to accept any brief which the Interstate Commerce Commission might wish to submit. This brief is filed in response to that expression and supports the Court of Appeals' conclusion that a dome step on a tank car does not fall within the scope of the Safety Appliance Act.

The device involved here is a wooden board or platform measuring 2 inches by 7½ inches by 6 feet (R. 26). It is attached to the tank adjacent

to the dome (Pl. Exs. 1 and 2; R. 131, 139 and 330). Its obvious purpose is convenience in loading and unloading the car, rather than safety in the movement of the car. (R. 249) As we will show below, the devices included within the scope of the Safety Appliance Act are those concerned with the movement of the car. That Act does not apply to devices or appliances which are supplied only for convenience in loading and unloading.

ARGUMENT

I. The dome step board is not a "running board" as that term is used in the Safety Appliance Act

A review of some of the historical background of the Safety Appliance Act is helpful in determining whether a particular device is an appliance within the scope of that Act. The rapid growth of the railroad industry immediately following the War between the States was accompanied by numerous accidents with an appalling loss of life.[1] Those accidents were caused to a large extent by the inadequacy of safety devices employed in the operation of the trains. Air brakes were not in general use. The stopping of trains and the control of their speed were done by the locomotive and by use of hand brakes. On freight trains, this required the operation of hand brakes from the top of moving trains and in all kinds of weather. The coupling device in general

[1] Interstate Commerce Commission Activities 1887–1937, pages 117–120. Safety Appliances on the Railroads, L. S. Coffin, Annals of Iowa, Volume V, No. 8, January 1903.

use was the old link and pin coupler which made it necessary for employees to go between the ends of the cars and operate the coupler by lifting the pin and frequently adjusting the link. This method of operation alone was responsible for many accidents resulting in loss of life or limb.

The excessive number of deaths and injuries to trainmen in coupling and uncoupling cars, and in falling from the top of moving trains while operating hand brakes, resulted in vigorous agitation for the equipment of freight cars with automatic couplers and trains with power brakes. As early as 1871, Senator Charles Sumner of Massachusetts initiated a general investigation of the matter by introducing a resolution providing "that the Committee on Commerce be instructed to consider the expediency of providing by law for the regulation of railroads in the United States, so as to prevent the loss of human life and to promote the safety of passengers."

In his first message to Congress in 1889, President Harrison urged that legislation be enacted to protect railroad employees. He said in part—"It is a reproach to our civilization that any class of American workmen who, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war." He repeated his recommendation on the subject in 1890, 1891 and 1892.[2]

[2] 21 Cong. Rec. 90; *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 19.

The original Safety Appliance Act, enacted in 1893 [3], in general terms required (1) that all locomotives be equipped with power driving-wheel brakes and appliances for operating the train-brake system; (2) that all trains have a sufficient number of power-braked cars so that the engineer could control the speed of the train without the use of hand brakes; (3) that all cars be equipped with automatic couplers; and (4) that all cars be equipped with grab irons or hand holds providing greater security for men coupling and uncoupling cars. The Commission was given authority to fix the standard height for draw bars for freight cars and to determine the date upon which the provisions of the Act should become applicable. In 1896, the Act was amended [4] to exempt therefrom certain logging cars.

The Act was again amended [5] in 1903 (1) to include cars being operated in intrastate traffic, (2) to fix at 50 percent the minimum number of cars in a train required to be equipped with power brakes and (3) to give the Commission authority to increase this percentage from time to time. This amendment also provided that all power-braked cars which were assembled in a train with the minimum percentage of power-braked cars must also have their power brakes in use and operation.

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[3] 27 Stat. 531–532; 45 U. S. C. 1–7.
[4] 29 Stat. 85; 45 U. S. C. 6.
[5] 32 Stat. 943; 45 U. S. C. 8–10.

With the development and greater use of the power brake, it was assumed that the number of injuries from falling from cars would decrease substantially. Thus, in reporting the statistics on this type of accident, the Commission in its 13th Annual Report (1899) stated, at page 55:

> It is believed that the number of killed and injured by falling from trains must be very largely reduced when the train brake comes into general use. The men will not then be obliged to use *the tops of cars for braking, nor to walk on the running boards.* The freight train will be as completely under the control of the engineer as passenger trains are at the present time. The number of killed and injured from this cause is as great as, if not greater than, the number of killed and injured in coupling and uncoupling cars. (Emphasis supplied.)

But the casualty rate continued high and the Commission noted in its 24th Annual Report (1910), at page 41, "an alarming number of accidents to employees by reason of falling from cars."

Even though appliances used by the trainmen riding the cars were not included within the Act, the Commission's inspectors noted their condition and included a report thereon. Thus in its 18th Annual Report (1904), at page 91, the Commission stated:

> In noting defects our inspectors do not confine themselves strictly to those appliances required by law, but include everything which involves the safety of employees such as ladders, steps, running boards on roofs of cars, etc., which are not in themselves required by law, but which are necessary to the safety of the men, and which have been so treated by the Master Car Builders' Association under its standards for the protection of trainmen. * * *

Again in its 21st Annual Report (1907), at page 135, the Commission stated:

> The safety-appliance law should be amended so as to cover all appliances included in the Master Car Builders' standards for the protection of train men. The Commission has long recognized these standards as proper and has endeavored to secure their enforcement. They cover generally sill steps, ladders, roof hand holds, and running boards. These appliances are necessary for the safety of employees; and it is important that they be kept in first-class condition. The Commission's inspectors take note of the condition of these appliances and report upon them, but as there is no penalty attached to their use in a defective condition, they are not always repaired when attention is called to them, whereas the defects covered by the law are, in most cases, promptly repaired. It is hoped that Congress may take action in the matter of legalizing the standards of the

Master Car Builders' Association for the protection of train men.

The recommendations also included the hand brake because "since the general introduction of air brakes the condition of the hand brakes has been sadly neglected." (20th Annual Report (1906), at page 70.)

Pursuant to these recommendations, the Act was amended in 1910[6] to include certain additional safety appliances. Cars were to be equipped with secure sill steps and efficient hand brakes; cars requiring secure ladders and running boards were to be so equipped; and secure hand holds or grab irons were to be installed on the roofs at the tops of such ladders.

This historical background of the Safety Appliance Act reveals quite clearly that the sole concern was over the wholly inadequate safety devices used in the movement of cars and trains. We can find no reference to appliances used in loading and unloading cars. The Act, as amended, includes automatic couplers, grab irons and handholds, air brakes, sill steps, ladders and running boards—all concerned with the movement of the train or car. On a car, the sill step is used

[6] 36 Stat. 298; 45 U. S. C. 11–16.

[7] As the court below points out, the Safety Appliance Act does not include every device with which a car may be equipped. "Only those are safety appliances which are officially determined by law or regulation to be such." 220 F. (2) at 245.

to ride the car or to reach the ladder, the ladder and hand holds are used to reach the running board, and the running board is used to reach the brake—all are directly related to the movement of the car.

This conclusion is further supported by the failure of the Commission to prescribe standards for the many types of devices placed on tank cars to facilitate the loading or unloading thereof.[7]

Experience had indicated a need not only for the safety appliances included in the Act but also for uniformity in such appliances. Thus during the debate on the floor of the House on the bill which eventually was enacted into law, in 1910, a member of the Committee in charge of the bill stated (45 Cong. Rec. 160):

> It is a fact that while the law of 1893 provided for certain grab irons and hand holds on cars, it did not provide for any uniformity of their attachment to the cars. The present law adds to the law of 1893, as amended in 1896 and again in 1903, by providing for safe sill steps and efficient hand brakes. It is a fact that while there has been an effort on the part of railroad organizations and master car-builders' associations to arrive at some kind of uniformity in the equipment of cars with these appliances, up to date they have not been

[7] The Car Builders' Cyclopedia, 19th Edition (1953), at pages 266, 271–279, shows pictures of various types of tank cars with different dome appliances.

able to agree. It is a fact that almost every freight train on almost every road contains cars equipped in several ways, so that the brakeman, switchman, or other employees who have use for these appliances are not able to determine on a dark night or under unusual circumstances just where these attachments are. It is proposed by this bill to authorize the commission, after full hearing, having given all of the carriers and all of the railroad organizations an opportunity to be heard, to determine what is the best method for the equipment of cars. The only amendments to the bill are the ones changing the year, which, of course, ought to be later now, inasmuch as the bill last year did not pass. We have therefore substituted for 1910 the year 1911, and we struck out the provision allowing the commission to alter these arrangements, and simply allowed them permission to grant an extension of the time during which carriers could equip their cars with these various appliances as provided for by the Interstate Commerce Commission. It seems to me, Mr. Speaker and gentlemen, that there can be no question about the necessity for this kind of legislation.

To meet that need, the amendment included a provision that the Interstate Commerce Commission should designate "the number, dimension, location and manner of application" of the appliances specified in that amendment as well as

in Section 4 of the original act, which should remain as the standards of equipment to be used unless changed by the Commission.

Pursuant to that authority, the Commission held hearings in September and October, 1910, and by order dated March 13, 1911, fixed the standards[2] for all appliances specified in section 4 of the original act (that is, "grab irons and handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars"), and Section 2 of the 1910 amendment (that is, sill steps, hand brakes, ladders, running boards, handholds and grab irons) (45 U. S. C. 4 and 11).

Thus it stated in its 25th Annual Report (1911), at page 82:

> The most important acts of the Commission in the administration of the safety-appliance laws during the past year were the promulgation of the orders of March 13, 1911. These orders definitely fixed the standards as to the number, dimensions, location, and manner of application of the appliances required by section 2 of the Act of April 14, 1910, and section 4 of the Act of March 2, 1893, on all equipment placed in service subsequent to July 1, 1911, and

[2] 49 CFR 131. Those standards, with one exception, have remained unchanged to this day. By order dated December 11, 1943, the carriers were authorized to use materials other than wood for running boards used on box and other house cars and foot boards used on steam locomotives in switching service.

extended the period within which all equipment actually in service on July 1, 1911, should be made conformable to its provisions.

The Commission was not niggardly in its administration of the new legislation, as shown by the fact that its order included certain devices not specifically named in Section 2 of the 1910 amendment (45 U. S. C. 11) or in Section 4 of the original law (45 U. S. C. 4). Thus, the Commission's order specified the standard for foot boards on switch engines, for brake steps "if used," and for safety railings on tank cars. The foot board was apparently considered to be the equivalent of a sill step, the brake step a part of the brake, and the safety railing on tank cars a part of the running board.

Conversely, the Commission's regulations do not prescribe the standard for the ladder on the tank car involved in this case extending between the running board and the dome step-board. The justification for not prescribing uniform standards for this ladder is the fact that the Safety Appliance Act does not embrace devices placed upon a car for convenience in loading and unloading.

The standard for every running board on cars included in the Commission's order of March 13, 1911, specifies in effect that they shall run the full length of the car. Thus, these appliances on box and other house cars must be located "full length

of car, center of roof" (49 CFR 131.1 (c) (3)). On tank cars without side-sills and tank cars with short side-sills and end platforms there must be "one (1) continuous running board around sides and ends, or two (2) running full length of tank, one (1) on each side" (49 CFR 131.8 (b) (1)). On tank cars without end-sills the running board must be "continuous around sides and ends of tank" (49 CFR 131.9 (c) (3)).

A running board on a tank car would be of little use to the trainmen "wishing to pass along" [10] while the car was in motion unless some railing was provided. So on all tank cars the Commission also provided for safety railings which should be not less than 30 inches nor more

[10] A running board is defined in Funk & Wagnall's New Standard Dictionary of the English Language, 1946, as follows:

"A footboard on the side of a locomotive, box car, oil car, etc., for the convenience of trainmen or others wishing to pass along."

The term is defined in Car Builders' Cyclopedia, 19th Ed. (1953), as follows:

"Running board. A plane surface, made of boards or a special metal structure, for trainmen to walk or run on. It is placed on the roof of box, stock, refrigerator, caboose and covered hopper cars, and at the sides of tank cars. Gondola, hopper and flat cars usually have none."

It was defined in the 1909 edition as follows:

"Running board. 1. 87, Figs. 262–272, etc. A plane surface, made usually of boards, for trainmen to walk or run on. It is placed on the roof of box or stock cars and at the side of tank cars. Gondola and flat cars usually have none.

"2. (Tank Car.) 119, Figs. 545–549. The only substitute for a car floor."

than 60 inches above the running board or platform (in the case of a car having side platforms) (49 CFR 131.7 (b), 131.8 (h) and 131.9 (g)).

These regulations, while prescribing the standards for certain appliances not specifically named in the Safety Appliance Act, do not mention the dome step or platform or any other device used in the loading or unloading of a tank car.

Since the Commission had been instrumental in obtaining the enactment of the 1910 amendment and had recommended that running boards be included among the appliances which should be and were added to the act, it would seem that the Commission would have made certain that its order setting forth the standards would include any appliance known as a "running board". It is readily apparent, therefore, that the Commission did not construe the term "running board" as used in the 1910 amendment to include a dome step or platform used in loading or unloading a tank car. The Court of Appeals concluded that "By its very failure to prescribe any regulation governing such a device, the Interstate Commerce Commission has demonstrated its administrative determination that dome step boards do not fall within the scope of the Act" (220 F. 2d, at 245). This conclusion was based to some extent, at least, upon the Court's reasoning that—

> * * * a chaotic condition would be produced if the question of compliance with the Safety Appliance Act and the specifi-

> cations governing the number, location, dimension and manner of appliances should be left to the varying notions of judges or the inexperienced laymen who comprise petit juries. For it is not every device with which a car might be equipped which comes under, and is governed by, the Safety Appliance Act or the regulations adopted by the Interstate Commerce Commission pursuant thereto. Only those are safety appliances which are officially determined by law or regulation to be such (citations omitted).

We submit that that conclusion and reasoning is sound and is well founded upon the principle that the conclusions of an administrative body on a subject over which it has jurisdiction is entitled to considerable weight. Moreover, the Commission's interpretation "gains much persuasiveness" from the fact that it was the Commission which recommended the legislation. Cf. *United States* v. *American Trucking Association*, 310 U. S. 534, 549. Surely, if the Commission had deemed such an appliance or the many others not named in the Act nor specified in its order to come within the scope of the Safety Appliance Act, it would have prescribed the standard therefor on at least an "if used" basis as it did in the case of the brake step.

Petitioner bases his argument that the dome step-board is a "running board" within the meaning of the Act almost solely upon several refer-

ences in the record by witnesses and counsel to that appliance as a running board. We believe the answer to this approach to be that the question is one of law and not of fact. As the Trial Court stated (R. 184):

The Court:

> There are a large number of witnesses in this case, and I am anxious to get along with it, and maybe I will save some time by stating that I am going to decide this question by what the Interstate Commerce Act, itself says and the regulations promulgated by the Interstate Commerce Commission under the Act, and the pertinent decisions of any Courts on the question. Not by the oral testimony of what people say they consider it under the Act.

and (R. 193):

The Court:

> I think it is purely a question of law as to whether it is within the scope of a definition of a safety appliance. Overrule.

As we have shown above, the legislative history and historical background of the Safety Appliance Act shows beyond question that the term "running board" means the board used to get from one end of the car to the other end. The dome step board, installed for convenience in loading and unloading, is not a "running board" as that term is used in the Safety Appliance Act.

A new approach to the subject, taken for the first time in this Court, is that the dome step

board may be included in the Commission's order of March 13, 1911. In support of this argument petitioner refers, at page 15 of his brief, to the fact that the Commission's regulations permit running boards to be placed above the center of the tank. However, the dome step, to meet the Commission's requirements as to running boards, would still have to extend the full length of the car, have a width of at least 10 inches, and be accompanied by a safety railing extending the full length of the car and not less than 30 inches nor more than 60 inches above the board.[11] The dome step board does not meet those specifications. Furthermore, it was obviously installed for convenience in loading and unloading.

II. Even if the dome step board were a "running board" it would not come within the scope of the Safety Appliance Act

Assuming arguendo that the dome step board is a running board as petitioner argues and is not included in the Commission's regulations, petitioner still may not prevail under this theory of his case because the Commission, under the law, is the sole judge of what running boards, if any, are *required*. Only *required* running boards come within the scope of the Safety Appliance Act. Thus, Section 11 provides that all cars *requiring* secure running boards shall be so equipped, and

[11] A picture of a tank car having such a running board is shown in Figure 443 on page 347 of the Car Builders' Cyclopedia, 14th Edition (1937).

Section 12 delegates to the Commission the duty of prescribing "the *number*, dimensions, location, and manner of application" of those running boards. The Commission in its order of March 13, 1911, did prescribe, among other things, the number of boards required on the type of tank car involved in this action. The tank car was equipped with the board so prescribed (petitioner's brief at page 15). Authority to specify the number of running boards necessarily carried with it authority to determine what running board, if any, was required on that type of car. Since the Commission determined that one board was required and the car was so equipped, any additional board would not be *required*, and hence not within the scope of the Safety Appliance Act. As this Court stated in *Atchison, T. & S. F. Ry. Co.* v. *Scarlett*, 300 U. S. 471, when a railroad has complied with the regulations laid down by the Commission pursuant to the Safety Appliance Act, it

> * * * has discharged its full duty so far as the ladder (or running board) requirement of the Safety Appliance Act is concerned. The judgment of the trial court and jury cannot be substituted for that of the Commission (citation omitted).

Petitioner argues that the proper approach to the problem here is that used in the *Carson* case.[12] There a yardman was injured when a wooden

[12] *Southern Pacific Co.* v. *Carson*, 169 F. 2d 734.

brake club used to wind the brake staff broke, causing him to fall. Carson sought damages under the language of Section 11 of the Safety Appliance Act requiring an "efficient hand brake." The Commission had prescribed a standard for a hand brake but had made no reference to a brake club. The Court of Appeals affirmed the judgment in favor of Carson, holding that it was properly a jury question to determine whether the brake was "efficient" because of the addition to it of a defective brake club.

In the *Carson* case the law *required* an "efficient hand brake," and it was necessary to determine whether the particular brake used was efficient, especially since it differed from the one prescribed by the Commission. In the instant case, the law does not *require* this so-called running board.

CONCLUSION

The dome step board involved in this case is not an appliance governed by the Safety Appliance Act. Therefore, the court below was correct in holding that petitioner had no cause of action under that Act.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel.

C. H. JOHNS,
Assistant General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

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